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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MATTHEW BRAKE et al., Plaintiffs and Appellants, v. OCWEN LOAN SERVICING, LLC, et al., Defendants and Respondents.	A153699 (Sonoma County Super. Ct. No. SCV257891)

Matthew and Nikki Brake (the Brakes) appeal from a judgment dismissing their second amended complaint (the SAC) against Ocwen Loan Servicing LLC, Western Progressive LLC and Wells Fargo Bank, N.A. (collectively, respondents). The SAC asserts a variety of causes of action concerning the servicing of the Brakes' residential mortgage and the foreclosure on their property, including breach of contract, claims under the California Homeowner Bill of Rights, wrongful foreclosure, negligence, unfair business practices, and fraud. The trial court granted respondents' motion to strike the Brakes' claim for fraud and sustained respondents' demurrer to the remainder of the SAC in its entirety without leave to amend.

We affirm.

FACTUAL BACKGROUND

Because this appeal is taken from a judgment after an order sustaining a demurrer, the relevant facts are drawn from the SAC and judicially noticed documents.[1]

In 2003, the Brakes borrowed $468,000 from WMC Mortgage Corp. to purchase a home located at 1624 Todd Road, Santa Rosa, California (the property). The Brakes secured the loan with a deed of trust. In 2006, the deed of trust was assigned to Wells Fargo Bank (Wells Fargo). Wells Fargo substituted Western Progressive in as trustee under a deed of trust in 2012, and Ocwen Loan Servicing (Ocwen) serviced the loan.

The Brakes filed for Chapter 13 bankruptcy in July 2012. Ocwen filed a proof of claim, to which the Brakes objected. In March 2013, the Brakes, Ocwen, and Wells Fargo reached an agreement to resolve the claim; their agreement was memorialized in a stipulation which incorporated and attached a Settlement and Release Agreement and a Modification Agreement. The Modification Agreement brought the Brakes' loan current and set new monthly payments of $3,346.24, consisting of $2,838.40 for principal and interest, and $507.84 for taxes and insurance. It further provided that the amount set for taxes and insurance was subject to periodic change. Both agreements contained a release of all claims arising in connection with the Brakes' loan or respondents' acts in collecting and enforcing the loan. The bankruptcy court approved the stipulation to resolve the Brakes' claim objection. The Brakes' bankruptcy was discharged in December 2013.

The Brakes' allegations regarding their payments are somewhat unclear but include the following statements. Between January 2013 and September 2015, respondents made "errors in accounting which led to Plaintiffs being overcharged for insurance and property taxes on their account." Respondents also "began rejecting timely full payments made to [respondents]." In December 2013, the Brakes asked respondents

[1] The trial court took judicial notice of several publicly recorded and judicial documents, including the deed of trust, documents from the Brakes' two bankruptcy proceedings, the November 5, 2014 Notice of Default, and the February 24, 2015 and August 26, 2015 Notices of Trustee's Sale.

for an accounting and they "were mislead by assurances made by Defendant that their account would be credited for the excessive insurance charges." Their January 2014 payment was denied "for being insufficient as the overcharging for insurance was not credited." At some point after 2013, they "were assigned a representative in Jason Dosco," an employee of Ocwen, with whom they were "in regular contact with . . . regarding their loss mitigation options."

On November 5, 2014, Western Progressive recorded a notice of default, which showed that the Brakes were $62,677.06 in arrears on their modified loan, reflecting over 17 months of failure to pay. In November 2014, the Brakes discovered that mail from respondents was being sent to a previous address and notified respondents that the mail was being incorrectly addressed. They signed up for mail forwarding and in January 2015 began receiving forwarded mail.

Over two months after the notice of default was recorded, on January 26, 2015, Ocwen returned two checks, both in the amount of $3,346.24, for the November and December 2014 payments. The Brakes contend they "contacted Ocwen . . . in order to find out why the checks had been denied as payment" but do not include any further allegations concerning the nature or result of this contact.

On February 11, 2015, a Notice of Trustee's Sale was placed on the gate of the Brakes' home indicating a planned sale date of March 24, 2015. In March 2015, the Brakes sent a written demand for an accounting. They also contacted Ocwen by phone to "inquire about the accounting," and were told they would receive a phone call on March 20 and "not to worry because no sale date was set." The Brakes contend they never received a return call, and were thereafter unable to contact Ocwen by email because "the links in the email they were sent had expired."

In March 2015, Nikki Brake filed for Chapter 13 bankruptcy protection and a hearing was scheduled for July 15, 2015. The trustee's sale set for March 24, 2015 was postponed upon notification of the bankruptcy proceeding. The next day, respondents sent an email to the Brakes "indicating that they could not locate account information in response to Plaintiffs email request for assistance." Nikki Brake failed to appear at the

scheduled July 15, 2015 bankruptcy hearing. The bankruptcy action was dismissed for failure to appear and failure to make payments pursuant to the Chapter 13 plan.

On July 30, 2015, another Notice of Trustee's Sale was posted on the gate of the Brakes' home noticing a sale date of September 10, 2015. The Brakes did not receive this notice by mail.

Western Progressive recorded another Notice of Trustee's Sale in August 2015 and that same month the Brakes sent a request for an accounting. The Brakes then sent faxes on September 8 and 9 "asking for the foreclosure sale to be postponed, an accounting, and notifying Defendant Western Progressive that they wished to cure the default." The Brakes contacted respondents on September 23 "to inquire into the foreclosure sale and whether [respondents] had provided requested documents" and respondents indicated that the foreclosure sale "would be postponed if documents were not received from [respondents] by 11am."

The trustee's sale was postponed to September 23, 2015, and Nikki Brake appeared at the sale. Western Progressive sold the property to Wells Fargo at the trustee's sale. The Brakes then commenced this action.

PROCEDURAL BACKGROUND

On October 15, 2015, the Brakes filed a complaint in the County of Sonoma against Ocwen and Western Progressive. The Brakes sought and obtained leave to file a first amended complaint (the FAC), which they filed on March 29, 2017 against Ocwen, Western Progressive and Wells Fargo. The trial court sustained a demurrer as to all causes of action with leave to amend, except as to the seventh cause of action for illegally collected fees under Civil Code section 2924.11,[2] which the court held was barred by the doctrine of res judicata.

On May 30, 2017, the Brakes filed the SAC, which alleged nine causes of action for: (1) breach of contract; (2) failure to assign a single point of contact (§ 2923.7 et

[2] Unless otherwise indicated, all further undesignated statutory references are to the Civil Code.

seq.); (3) wrongful foreclosure (§§ 2923.5, 2924(a)(6) & 2924.17 et seq.); (4) failure to perform loss mitigation prior to wrongful foreclosure (§ 2923.55 et seq.); (5) per se wrongful foreclosure for failure to give statutory notice (§§ 2924.3, 2924.8 & 2924b); (6) illegally collected foreclosure related costs and expenses after wrongful foreclosure (§ 2924d); (7) negligence (§ 1714(a)); (8) unfair business practices § 17200 et seq.); and (9) fraud based upon intentional misrepresentation.[3] The first (breach of contract), second (failure to assign a single point of contact) and fourth (failure to perform loss mitigation prior to wrongful foreclosure) causes of action are asserted against Ocwen and Wells Fargo. The remaining causes of action are asserted against all defendants.

The SAC asserts identical facts and causes of action as the FAC, except the attachment of a copy of the Modification Agreement and the addition of (without leave of court) the fraud cause of action. The trial court sustained respondents' demurrer to the SAC in its entirety, without leave to amend, and granted respondents' motion to strike the fraud cause of action.

In denying the Brakes' request for leave to amend, the trial court observed that "Plaintiffs were given the opportunity to amend their FAC to state a cause of action. They have been unable to do so as evidenced by their failure to allege anything new to correct the defects in their pleading." The court also pointed out that the Brakes' arguments in opposition to the demurrer were "a regurgitation of the arguments they made in opposition to the previous demurrer."

Notice of Entry of Judgment was served on January 3, 2018. The Brakes filed a timely notice of appeal on February 14, 2018.

[3] The Brakes list their cause of action for fraud based on intentional misrepresentation as the ninth cause of action on the first page of the SAC, but then skip the ninth cause of action in the body of the SAC and refer to the fraud claim as the tenth cause of action.

DISCUSSION

I. Standard of Review

An order sustaining a demurrer is reviewed de novo. (*Brown v. Deutsche Bank National Trust Co*. (2016) 247 Cal.App.4th 275, 279.) In so doing, "[w]e accept as true all well-pleaded allegations in the operative complaint, and we will reverse the trial court's order of dismissal if the factual allegations state a cause of action on any available legal theory." (*Ibid.*) We construe the complaint "liberally . . . with a view to substantial justice between the parties" (Code Civ. Proc. § 452) and treat it " 'as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.]' . . . . Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." *(Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Kirwan*).) "We also accept as true all materials properly 'subject to judicial notice,' and disregard any allegations in the operative complaint that those judicially noticed facts contradict or negate. [Citation]." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1335 (*Schep*).) Furthermore, "written instruments . . . which are the foundations of the causes of action and attached to the complaint as exhibits may also be examined by the court" on demurrer. (*SCEcorp v. Superior Court* (1992) 3 Cal.App.4th 673, 677.)

With these standards in mind, we consider whether the Brakes have stated any cause of action and conclude that they have failed to do so.

II. First Cause of Action - Breach of Contract

The first cause of action alleges respondents breached the Modification Agreement by overcharging for escrow amounts, refusing to accept offered payments, "failing to provide instructions for tender of default," and using an incorrect mailing address. The trial court appropriately sustained the demurrer to the breach of contract cause of action because "Plaintiffs still fail to allege what provision(s) of that agreement applies here to create the obligation sued upon." The court explained that, "[a]s stated in *Murphy v. Hartford Acc. & Indem. Co*. (1960) 177 Cal.App.2d 539, 543, 'In order for an action to be based on an instrument in writing, the writing must express the obligation sued upon.'. . . Defendants again argue that there are no applicable provisions in the loan

modification agreement, but Plaintiffs still fail to address this contention in their opposition. The court can only conclude there are no provisions of the agreement that have been breached."

Indeed, cases cited by the Brakes highlight the importance of pleading a breach of contract cause of action with specificity. (See *Levy v. State Farm Mutual Automobile Insurance Co.* (2007) 150 Cal.App.4th 1, 5 ["[f]acts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity"]; *Poirier v. Gravel* (1891) 88 Cal. 79, 82 ["a complaint for breach of contract must state the breach in unequivocal language"].)

We now examine the Brakes' specific allegations.

A. Alleged Overcharges and Rejected Payments

The Brakes aver, without pointing to any specific provision, that respondents breached the Modification Agreement by overcharging them for escrow amounts and rejecting payments in connection with the alleged overcharges. They allege that "[w]ithout excuse, [respondents] breached the contract by overcharging for escrow amounts over and above that designated by contract, by repeated refusals to accept the offered payments and by failing to provide instructions for tender of default," and that they "fully performed their obligations by tendering full payments as required timely, but were excused from the default because the Defendants failed to properly credit their account with the timely full tendered payments." The only allegations concerning specific payments are that "[o]n January 26, 2015 [respondents] returned checks to Plaintiffs which were written for the months of November 2014 and December 2014 in the amount of $3346.24 each," and that their January 2014 payment was "denied [by respondents] for being insufficient as the overcharging for insurance was not credited."

The Brakes' broad allegations concerning rejected payments are not plead with sufficient specificity and, in any event, demonstrate extended periods of failure to pay. The Brakes allege that over the two years between the signing of the Modification Agreement in March 2013 and their filing for bankruptcy in March 2015, respondents refused to accept their payments or "provide instructions for the tender of default."

However, the Brakes only specifically allege that their payments for January, November and December 2014 were rejected. They fail to provide any allegations as to how the rejection of a payment after over one year of nonpayment and then the rejection of two payments after a notice of default almost one year later constituted a breach of the Modification Agreement.

The facts in this case are similar to those in *Fischer v. Ditech Financial LLC* (E.D. Cal., May 23, 2017, No. 1.16-cv-01558-DAD-EPG) 2017 U.S.Dist. Lexis 78364. There, the federal district court granted defendants' motion to dismiss plaintiff's California law breach of contract claim stemming from a mortgage loan because plaintiff's vague allegations that defendants breached a contract by failing to accept payments to repay her loan were insufficient. (*Id.* at *7). The court explained that "[w]hen pleading the existence of a contract, a plaintiff … is required to 'identify the specific provision of the contract allegedly breached by the defendant.' [Citation]," citing several federal cases and *Murphy*, *supra*, 177 Cal.App.2d 539 at p. 543.

The Brakes fail to provide any specific allegations regarding how payments were improperly calculated, the amounts of alleged overcharges, the proper escrow charge or calculations, or how the three rejected payments constituted a breach. Moreover, there is no identification of which, if any, provisions of the Modification Agreement have been breached. The Brakes' broad and conclusory allegations are not plead with the required specificity and are insufficient to support a breach of contract cause of action. (See *Schep, supra*, 12 Cal.App.5th at p. 1337 ["on demurrer, courts may disregard 'logical inferences, contentions, or conclusions of fact or law' pled in the operative complaint. [Citation]"].)

B. Incorrect Mailing Address

The Brakes aver that "with notice of problems caused by their use of the wrong mailing address for Plaintiffs and with knowledge that Plaintiffs were being overcharged under the Deed of Trust, Defendants breached the contract by intentionally refusing to correct the errors, and instead foreclosed on Plaintiffs' home in breach of contract with bad faith and unclean hands."

The Brakes do not identify any provision of the Modification Agreement that has been breached by "problems caused by their use of the wrong mailing address" or any actual harm caused by this alleged breach as the Brakes clearly did receive notice of the foreclosure sale. The Brakes admit that they received mail that was forwarded to them from their former address after January 19, 2015. Thus, these allegations also fail to establish a cause of action for breach of contract.

III. Second Through Sixth Causes of Action - Homeowner Bill of Rights Claims

The second through sixth causes of action are for violations of the California Homeowner Bill of Rights (collectively referred to as the "HBOR claims"). The HBOR is a series of California laws that went into effect on January 1, 2013 to provide borrowers with procedural protections to foster alternatives to foreclosure, and to give borrowers a private right of action for certain material violations of its provisions. (§ 2924.12, subd. (b).)[4] The trial court sustained respondents' demurrer to the HBOR causes of action, noting that the "allegations [in the SAC] remain the same as those already deemed inadequate by the court on the previous demurrer."

In their opening brief, the Brakes review the background and purpose of the HBOR and explain that homeowners are permitted to bring an action for a "material violation" of certain provisions of the HBOR. (See § 2924.12, subd. (b).) However, in the sections addressing their HBOR causes of action, the Brakes simply copy the allegations from the SAC verbatim without providing *any* additional argument, explanation or authority. " 'Although our review of a [demurrer] is de novo, it is limited to issues [that] have been adequately raised and supported in plaintiffs' brief. [Citations.] Issues not raised in an appellant's brief are deemed waived or abandoned. [Citation.]' " (*Davies v. Sallie Mae, Inc.* (2008) 168 Cal.App.4th 1086, 1096 (*Davies*); See *Pfeifer v. Countrywide Home Loans, Inc*. (2012) 211 Cal.App.4th 1250, 1282 (*Pfeifer*) [the court deemed causes of action waived where "[plaintiff's] opening brief did not include any

[4] On January 1, 2018, certain provisions of the HBOR expired. Further references to the HBOR statutes are to the version that applies to the claims made in this case.

specific argument or supporting authority regarding these causes of action . . . ."]; See also *Cahill v. San Diego Gas & Electric* (2011) 194 Cal.App.4th 939, 956 [" 'Appellate briefs must provide argument and legal authority for the positions taken' . . . [Citation] . . . .'We are not bound to develop appellants' arguments for them. [Citation].' "].)

Accordingly, we hold that the Brakes have waived any and all appellate issues as to their second through sixth causes of action under the HBOR. In addition, we find that these causes of action also fail on the merits.

A. Single Point of Contact ("SPOC") Claim

In their second cause of action, the Brakes contend that respondents failed to appoint a single point of contact ("SPOC") under section 2923.7 of the HBOR. Specifically, under the version of section 2923.7 in effect at the time of the dispute, "*[u]pon request from a borrower* who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." (§ 2923.7, subd. (a), italics added.) A SPOC is "an individual or team of personnel each of whom has" responsibilities to communicate the foreclosure prevention process, coordinate receipt of documents, has access to current information, ensures that the borrower is considered for foreclosure prevention alternatives, and has access to individuals who can stop foreclosure proceedings. (§ 2923.7, subds. (b), (e).)

The Brakes allege that they "were never provided with an adequate SPOC to review options to avoid foreclosure, in spite of seeking an accounting on their account and ultimately requesting foreclosure prevention alternatives, but rather were assigned a representative in Jason Dosco. Plaintiffs have spoken with Joe, Adar, several other unidentified individuals, and have been told to contact Jason Dosco. At no time has Defendant OCWEN assigned a single point of contact and no agent of Defendant OCWEN nor Defendants has ever been knowledgeable of Plaintiffs case." As noted, the Brakes have not provided any authority or additional argument beyond the verbatim allegations of the SAC in their opening brief.

Respondents are exempted under section 2923.6, subdivision (g), from having to appoint a SPOC since the Brakes did not allege a material change to their financial condition and were thus not entitled to a second loan modification process. Section 2923.6, subdivision (g), of the HBOR prevents borrowers from delaying the foreclosure process by repeatedly submitting new applications following a denial. This provision permits mortgage servicers to decline to rereview borrowers unless there has been a "material change in the borrower's financial circumstances." (§ 2923.6, subd. (g).)[5]

To allege the requisite material change in financial circumstances, plaintiffs must allege specific facts demonstrating a change in financial circumstances. (See *Morton v. Wells Fargo Bank, N.A.* (N.D. Cal., Dec. 7, 2016, No. 16-cv-05833-HRL) 2016 U.S.Dist. Lexis 169419 at *10 [[s]ince [plaintiff] accepted a previous loan modification and has not adequately alleged documenting and submitting a change in material circumstances, he has not alleged sufficient facts to establish that [defendant] had an obligation to review his new loan modification]; See also *Gilmore v. Wells Fargo Bank N.A.* (N.D. Cal. 2014) 75 F.Supp.3d 1255, 1264 (plaintiff's allegations were sufficient to survive a motion to dismiss where she "alleged a specific change in her financial circumstances, and she alleged that she provided documentation of the change to [defendant]."]

The Brakes obtained a loan modification in 2013 and were not entitled to be reviewed for another loan modification absent a change in their financial circumstances. Because the Brakes have offered no allegations that satisfy the "material change" requirement for a second loan evaluation under section 2923.6, subdivision (g), respondents were not required to appoint a SPOC under the HBOR.

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[5] The version of section 2923.6 subdivision (g) in effect at the time of the dispute provides: "In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded . . . a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer."

Even if the Brakes were entitled to a SPOC, the SAC does not establish that they had requested a SPOC as required by statute. The version of section 2923.7, subdivision (a), in effect at the time of dispute provides that "*[u]pon request* from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish" a SPOC. (§ 2923.7, subd. (a), italics added.) Courts interpreting the section 2923.7 requirement have held that plaintiffs must allege that they have requested a SPOC. (See *Galvez v. Wells Fargo Bank, N.A.* (N.D.Cal. 2018, No. 17-cv-06003-JSC) 2018 U.S.Dist. Lexis 172087 at *15 ["to state a claim under 2923.7, Plaintiff must allege that she requested a single point of contact. It is not enough to allege that one was not designated for her . . . ."]) The Brakes fail to affirmatively allege that they requested a SPOC and their allegations that they "were never provided" with or "actually appointed" a SPOC do not save their claim.

As these issues are dispositive, we do not address respondents' argument that they did not owe a duty to appoint a SPOC during a pending bankruptcy or that the SPOC requirements were satisfied.

B. HBOR Wrongful Foreclosure Claims

In the third and fourth causes of action, the Brakes raise numerous allegations in support of their wrongful foreclosure claims under various provisions of the HBOR. These allegations fall into two general categories: (1) a belated assignment of the deed of trust; and (2) irregularities in the foreclosure process.

1. Standing to Allege Late Assignment of the Deed of Trust

The Brakes allege that respondents lacked the right to conduct a non-judicial foreclosure sale because the assignment of their loan to Wells Fargo as trustee was invalid under section 2924, subdivision (a)(6), since the assignment was recorded after the securitized trust's closing date. We hold that the Brakes lack standing to challenge this alleged late assignment.

Section 2924, subdivision (a)(6), provides that "[n]o entity shall record . . . a notice of default . . . unless it is the holder of the beneficial interest under the mortgage or deed of trust . . . ." In their opening brief, the Brakes merely repeat verbatim fifteen

paragraphs from their SAC and do not cite any legal authority, other than section 2924, subdivision (a)(6), in support of their late assignment argument.

Although a borrower who has suffered a nonjudicial foreclosure has standing to sue for wrongful foreclosure based on an allegedly void assignment, a borrower does not have standing to attack a merely voidable assignment. (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939–940.) Recent California authority holds that an untimely assignment of a loan or deed is voidable, but not void. (*Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 43 *(Kalnoki)* ["an assignment to a securitized trust made after the trust's closing date is merely voidable."]

Because the allegedly late assignment of the loan to Wells Fargo could render the loan voidable, but not void, the Brakes lack standing to challenge the foreclosure on the late assignment ground. **(***Kalnoki*, *supra*, 8 Cal.App.5th at p. 43.)

2. Irregularities in the Foreclosure Proceedings

The remaining allegations supporting the Brakes' third and fourth causes of action for wrongful foreclosure under the HBOR center around alleged irregularities with the foreclosure proceedings. The Brakes' allegations in support of these causes of action include that "Plaintiffs using non-judicial foreclosure . . . did not provide legal notice as required under code, filed false declarations regarding the same," failed to provide "required statements," and "were never able to make meaningful contact when trying to make their payments." The Brakes bring these claims under sections 2923.55 and 2924.17, and again only copy the relevant portions of the SAC without providing any additional argument or authority.

a. Obligations Under Section 2923.55

Under the version of section 2923.55[6] in effect at the time of the dispute, the loan servicer must either contact the borrower "in person or by telephone in order to assess the

[6] The Brakes allege violations of § 2923.5 and § 2923.55. In 2013, the relevant portion of § 2923.5 were recodified in § 2923.55. On January 1, 2018, § 2923.55 was repealed and the obligations regarding outreach during the foreclosure process are again codified in § 2923.5.

borrower's financial situation and explore options for the borrower to avoid foreclosure" or else satisfy specified due diligence requirements at least 30 days before a Notice of Default ("NOD") is recorded. (§ 2923.55, subds. (b)(2), (f).) The statute "does not actually require that a lender modify a defaulting borrower's loan," or engage in extended analysis, but merely "contemplates contact and some analysis of the borrower's financial situation." (*Davenport v. Litton Loan Servicing LP* (N.D.Cal. 2010) 725 F.Supp.2d 862, 877; See *Brown v. U.S. Bancorp* (C.D.Cal 2012, No. CV 11–6125) 2012 U.S. Dist. Lexis 26226 at *19 ["Because plaintiffs admit that they discussed loan modifications with [defendant] well before the notice of default was recorded, their allegation that defendants failed to comply with § 2923.55 fails."])

The Brakes' allegations demonstrate that respondents fulfilled their obligations under section 2923.55, subdivision (b)(2) to "assess the [Brakes'] situation and explore options." In support of their section 2923.55 claim, the Brakes allege that "[n]o attempt was ever made to contact Plaintiffs as required by Civil Code Section 2923.55, and Plaintiffs were never able to make meaningful contact when trying to make their payments," and that a NOD was "recorded against Plaintiffs' home and Plaintiffs were not contacted to discuss mitigation options."

However, these allegations are negated by the Brakes' admissions that they had conversations with respondents about their financial situation before the NOD. They admit that "they were . . . in regular contact with Jason Dosco [an Ocwen representative] regarding their loss mitigation options." (See *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1494–1495 [borrower did not state a cause of action under § 2923.5 (predecessor to § 2923.55) where the complaint alleged that plaintiffs had repeated contacts with defendants regarding a possible loan modification].); See also *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 232 [court held that "assess" and "explore" under section 2923.5 should be construed narrowly.])

The Brakes also claim that respondents "failed to perform their due diligence" under section 2923.55. However, the "due diligence" requirements outlined in section 2923.55, subsection (f) are only triggered if the loan servicer is unable to contact the

borrower. (See section 2923.55, subd. (a)(2) [loan servicer may record a NOD "[e]ither 30 days after initial contact is made as required by paragraph (2) of subdivision (b) *or* 30 days after satisfying the due diligence requirements as described in subdivision (f)." (italics added).] Because respondents fulfilled their contact obligations under section 2923.55, subdivision (b)(2), we do not reach the issue of whether respondents met the due diligence requirements of section 2923.55, subdivision (f).

Finally, the Brakes allege that respondents violated section 2923.55, subsections (b)(1) and (b)(2) because respondents did not inform them of the right to request a "subsequent meeting" to discuss foreclosure options, did not provide them a letter with a HUD-certified counseling agency's phone number, and did not provide a statement that they could request documents related to their loan. As discussed in section III.B.2.c below, these allegations are insufficient to save the HBOR cause of action because they do not allege "actual economic damages" based upon "material" violations of the HBOR. (See § 2924.12, subd. (b).)

b. Accuracy of Foreclosure Documents Under Section 2924.17

HBOR section 2924.17 provides that certain documents related to the foreclosure process, including "a notice of default, notice of sale . . . recorded by or on behalf of a mortgage servicer in connection with a foreclosure . . . shall be accurate and complete and supported by competent and reliable evidence."

The Brakes make the conclusory and somewhat circular allegations in the SAC that the declarations filed by respondents in support of the Notice of Default are "wrongful" and "untruthful" because respondents "never contacted Plaintiffs to discuss mitigation options and are not authorized to initiate foreclosure proceedings without doing so," and that respondents "falsely declare[] under penalty of perjury that contact was made with Plaintiffs to assess their financial situation and explore option[s] to avoid foreclosure."

Such conclusory allegations are insufficient to support a cause of action for wrongful foreclosure. (See *Kirwan*, *supra*, 39 Cal.3d at p. 318 [in reviewing an order sustaining a demurrer, a court must " 'admit all material facts properly pleaded, but not

contentions, deductions or conclusions of fact or law.' "); See also *Davis v. U.S. Bank NA* (C.D.Cal. May 6, 2015, No. CV 15–01572 SJO) 2015 U.S. Dist. Lexis 62606 at *16–17 ["although § 2924.17 does not state the level of specificity with which a plaintiff must identify the inaccuracies contained in the NOD . . . Plaintiff must plead sufficient facts 'to raise a right to relief above the speculative level' . . . [Citation]"].)

c. No Actual Economic Damages Based Upon Material Violations of the HBOR

The Brakes' allegations concerning alleged irregularities in the foreclosure process are insufficient to support a wrongful foreclosure claim under either section 2923.55 or 2924.17 because they do not allege "actual economic damages" based upon "material" violations of the HBOR. (See § 2924.12, subd. (b) [a mortgage servicer "shall be liable to a borrower for actual economic damages . . . resulting from a material violation of . . . Section 2923.55 . . . or 2924.17."])

The court in *Cardenas v. Caliber Home Loans, Inc*, (N.D. Cal. 2017) 281 F.Supp.3d 862, 869, dismissed plaintiff's section 2924.17 cause of action because he "failed to plead facts demonstrating that [the] alleged violations of § 2924.17 were material." Noting the paucity of case law defining materiality under the HBOR, the court adopted the approach for analyzing materiality under section 2924.17 used in *Johnson v. PNC Mortgage* (N.D. Cal. 2014) 2014 U.S. Dist. LEXIS 163531. In *Johnson*, the court equated a "material violation" with one that "affected [the plaintiff's] loan obligations" or the loan modification process. (*Id.* at *27; See also *Richardson v. Wells Fargo Bank, NA* (C.D. Cal 2016, No. EDCV 16–873–VAP) 2016 U.S. Dist. Lexis 107090 at *13 [plaintiff failed to establish "material" violations of the statute in her complaint where "[s]he simply recites the elements of Section 2923.55 and in a conclusory manner alleges Defendant violated them . . . . For example, she states that before filing the [NOD], Defendant 'never contacted her by phone to discuss options to avoid foreclosure and never informed her of her right to request any subsequent meeting.' "])

The SAC cannot be read to support an argument that the alleged irregularities affected the Brakes' loan modification process or obligations. Further, the Brakes do not

allege any facts demonstrating "actual economic damages" resulting from the alleged irregularities in the foreclosure process in support of their section 2923.55 and 2924.17 claims. Simply put, the Brakes have failed to make the connection between allegations concerning problems with communications, documents involved with the foreclosure process and economic harm that would not have occurred otherwise. Therefore, they have failed to establish material violations resulting in harm.

C. Failure to Give Statutory Notice

In their fifth cause of action, the Brakes allege that respondents violated HBOR sections 2924.3, 2924.8 and 2924b by sending notices to an incorrect address, and thus failed to give cognizable statutory notice of the Notice of Default and Notice of Trustee's Sale. Again, the Brakes have copied the allegations from the SAC verbatim and have provided no authority to demonstrate that they are entitled to a post-foreclosure remedy under sections 2924.3, 2924.8 or 2924b. (See § 2924.12, subd. (b) [at the time of the dispute, section 2924.12, subdivision (b) permitted a post-foreclosure remedy only for material violations of "Section 2923.55, 2923.6, 2923.7, 2924.9, 2924.10, 2924.11, or 2924.17 . . . ."])

Moreover, to state a viable claim for wrongful foreclosure, a plaintiff must allege not only the procedural irregularity but also facts showing prejudice due to the irregularity. (See *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 [" 'prejudice' . . . is not presumed from 'mere irregularities' in the process. [Citation]"].) The only allegation the Brakes offer in support of this claim is that the statutory notices were mailed to the wrong address. However, they admit that they received mail that was forwarded to them from their former address. They further admit that a Notice of Trustee's Sale was placed on the gate of their home, where they were living, more than a month before the postponed March 2015 sale and more than a month before the September 2015 sale. Finally, Nikki Brake's appearance at the September 2015 foreclosure sale demonstrates that she was aware it was occurring. These allegations, which clearly reflect actual notice, are not sufficient to support a cause of action for wrongful foreclosure for failure to give notice. (See *Lehner v. United States* (9th Cir.

1982) 685 F.2d 1187, 1190–1191 [applying California law to a due process claim in nonjudicial foreclosure sale, where HUD mailed formal notice of sale to wrong address, but mortgagor nonetheless received actual notice of sale, notice is adequate as a matter of law].)

Thus, the Brakes have failed to demonstrate that they are entitled to relief under sections 2924.3, 2924.8 or 2924b as they received actual notice and have not suffered any prejudice due to a lack of notice.

D. Foreclosure Related Fees

The Brakes' final HBOR claim alleges that respondents charged them excessive foreclosure related fees under sections 2924c and 2924d "by the act of transferring title in the subject property from Plaintiffs to Defendants." Their opening brief restates verbatim the allegations from their SAC regarding this cause of action without adding any explanation or additional authority.

Sections 2924c and 2924d set allowable foreclosure related costs that are charged to the borrower if a loan is reinstated or redeemed. (§§ 2924c, 2924d; See *Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1173 [sections 2924c and 2924d "limit the fees that may be charged if a loan is reinstated or redeemed."]) The Brakes do not allege that they paid any foreclosure related fees and they provide no authority that transfer of title resulted in illegal fees or the functional or legal equivalent of such fees. Thus, they fail to state a claim.

IV. Seventh Cause of Action - Negligence

To state a cause of action for negligence, a plaintiff must allege "(1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury." (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114 (*Tribeca*).) "Whether a duty of care exists is a question of law to be determined on a case-by-case basis. [Citation.]" (*Lueras v. BAC Home Loan Servicing, LP* (2013) 221 Cal.App.4th 49, 62.)

The Brakes assert that the HBOR "mandate[s] a duty upon [respondents] to assure that appropriate safeguards are put into place and loss mitigation options are explored

prior to any foreclosure sale," and that under *Alvarez v. BAC Home Loans Servicing, LP* (2014) 228 Cal.App.4th 941 (*Alvarez*), they were owed a general duty of care "once they enter into a loan modification agreement." The Brakes allege that respondents breached this duty "when it ignored the requests to use the correct address and requests to pay off the arrears."

"[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money." (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096 (*Nymark*).) In *Alvarez*, the plaintiffs alleged that their lenders mishandled their applications for loan modifications by relying on incorrect information and therefore grossly underestimating plaintiffs' ability to pay. (*Alvarez, supra,* 228 Cal.App.4th at p. 945.) Applying the factors set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647, the *Alvarez* court held that a home mortgage lender owed a borrower a duty of care in "the review of [borrowers'] loan modification applications once [the lender] agreed to consider them." (*Id.* at p. 994)[7]

Even if we assume that respondents had a duty to exercise ordinary care in their dealings with the Brakes, the Brakes have not adequately alleged a breach of that obligation, nor have they demonstrated a proximate cause between the breach and the alleged injury. (See *Tribeca, supra,* 239 Cal.App.4th at p. 1114 [breach of the duty to exercise ordinary care and proximate cause between the breach and the plaintiff's injury are essential elements for a negligence cause of action].) Unlike in *Alvarez*, where the respondents failed to timely and carefully process the plaintiff's loan modification application, the Brakes had already been granted a modification of their loan more than

[7] In order to determine whether a duty of care exists, courts balance the *Biakanja* factors, "among which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm." (*Nymark,* supra, 231 Cal.App.3d at p. 1098, citing *Biakanja v. Irving* (1958) 49 Cal.2d 647.)

two years prior to the foreclosure and there was not any request for an additional modification of their loan. Rather, the Brakes make the conclusory allegation that "[i]t is certain that had the mail been properly processed and Defendants had an effective communication system in place that Plaintiffs would not have lost their home and a foreclosure would have been unnecessary."

The Brakes were $62,677.06 in arrears on their modified loan at the time of the foreclosure, and they had filed for bankruptcy twice. Moreover, the allegations of the SAC demonstrate that they had notice of the trustee's sale. The Brakes do not offer any explanation for how they would not have lost their home if not for the alleged mail and communication problems. Thus, even if a duty of care existed, the Brakes fail to establish a claim for negligence. (See *Villanueva v. Select Portfolio Servs.* (C.D.Cal. 2015) 2015 U.S.Dist. Lexis 96333 at *6 [plaintiffs failed to establish a cause of action for negligence regarding the servicing of her loan where she pled "no facts regarding the proximate cause of any injury that resulted from any alleged negligence."])

In addition, the Brakes' argument that "the violation of statutory requirements regarding proper legal notice of pre-foreclosure notices to Plaintiffs makes this. . . per se negligent for violation of statute" is without merit. Under Evidence Code 669, a person's negligence is presumed only if he violated a statute and the violation "proximately caused death or injury to person or property." (See *Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc*. (2009) 177 Cal.App.4th 624, 643.)

V. Eighth Cause of Action - Unfair Competition Law

In their eighth cause of action, the Brakes allege violations of the Unfair Competition Law ("UCL"), Business and Professions Code section 17200 et seq., on the following allegations: their "contract had been breached;" respondents "have violated numerous provisions of the Home Owners [sic] Bill of Rights;" and respondents "failed to ensure that appropriate safeguards are put into place prior to the foreclosure sale."

The UCL defines unfair competition to include "unlawful, unfair, or fraudulent business act[s] or practice[s]." (Bus. & Prof. Code § 17200 et seq.) Each prong of the UCL is a separate and distinct theory of liability. (See *West v. JP Morgan Chase Bank*

(2013) 214 Cal. App. 4th 780, 805.) Although the UCL coverage is broad, it " 'is not an all-purpose substitute for a tort or contract action [Citation].' " (*Korea Supply Co. v. Lockheed Martin Corp*. (2003) 29 Cal.4th 1134, 1150.)

The Brakes' UCL claim is not viable because it is entirely derivative of their other, fatally flawed, breach of contract and HBOR causes of action. (See *Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 277 [plaintiff's "UCL claim is derivative of [his] defamation cause of action, that is, it is based on the same [allegations] and likewise that cause of action stands or falls with that underlying claim."]) The only allegation that is separately stated in support of the UCL claim is that respondents "failed to ensure that appropriate safeguards are put into place prior to the foreclosure sale." This allegation does not contain any specific facts that would bring it outside of the umbrella of the Brakes' HBOR claims and, therefore, the UCL claim falls along with the underlying claims.

We need not, and do not, reach respondents' arguments that the Brakes' remedies under the UCL are limited to injunctive relief or restitution.

VI. Tenth Cause of Action - Fraud Based on Intentional Misrepresentation[8]

The trial court granted respondents' motion to strike the fraud cause of action on the basis that it was added to the FAC without leave of court. In so doing, the court noted that the Brakes did not file an opposition and cited *Harris v. Wachovia Mortg., FSB* (2010) 185 Cal.App.4th 1018 for the proposition that "[t]he plaintiff may not amend the complaint to add a new cause of action without having obtained permission to do so, unless the new cause of action is within the scope of the order granting leave to amend."

On appeal, the Brakes do not mention this cause of action or the motion to strike anywhere in their briefs and it is therefore deemed waived. (See *Pfeifer*, *supra*, 211 Cal.App.4th at p. 1282 [the court deemed causes of action waived where "[plaintiff's]

[8] As mentioned in footnote 2, there is no ninth cause of action in the SAC.

opening brief did not include any specific argument or supporting authority regarding these causes of action . . . ."]; See also *Davies, supra,* 168 Cal.App.4th at p. 1096 [" 'Although our review of a [demurrer] is de novo, it is limited to issues [that] have been adequately raised and supported in plaintiffs' brief.' [Citation]' "] Accordingly, we affirm the trial court's ruling.

VII. No Abuse of Discretion in Denying Leave to Amend

When the trial court sustains a demurrer without leave to amend, " 'we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation]." (*Kirwan, supra,* Cal.3d at p. 318.) To meet the burden of showing abuse of discretion, "the plaintiff must show how the complaint can be amended to state a cause of action." (*Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal.App.3d 1371, 1386.)

To show error in the trial court's denial of leave to amend, the Brakes must "clearly and specifically state 'the legal basis for amendment, i.e., the elements of the cause of action,' as well as the 'factual allegations that sufficiently state all required elements of that cause of action.' " (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95, disapproved of on other grounds in *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500, 508). " 'The assertion of an abstract right to amend does not satisfy this burden.' [Citation]" (*Id.* at p. 95.)

The Brakes had three attempts to craft a cognizable complaint in the trial court – the original Complaint, the FAC, and the SAC. In sustaining the demurrer, the court noted that that the "first cause of action for breach of contract alleges the same facts as in the FAC," and that the second through eighth causes of action "remain the same as those already deemed inadequate by the court on the previous demurrer." (See *Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539 ["[w]hen a demurrer is sustained with leave to amend but plaintiff elects not to do so, we presume the complaint states as strong a case as the plaintiff can muster."]) In fact, the only

substantial difference between the FAC and the SAC was that the Brakes attached the Modification Agreement to the SAC. The trial court further pointed out that the Brakes' arguments in their opposition to the demurrer were "a regurgitation of the arguments they made in opposition to the previous demurrer."

As detailed above, the allegations in the SAC and the inclusion of the Modification Agreement do not support the causes of action despite the Brakes having had the opportunity to amend their complaint after the trial court sustained the demurrer to their FAC. Further, the Brakes have not identified any facts that would cure the defects in the SAC. Therefore, we conclude that the trial court did not abuse its discretion in denying any further opportunity to amend.

DISPOSITION

The order is affirmed. Respondents are entitled to recover their costs on appeal.

Petrou, J.

WE CONCUR:

Siggins, P.J.

Wiseman, J.[*]

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[*] Retired Associate Judge of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.